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No. 90-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

C.L. GRIMES,

Petitioner,

v.

CENTERIOR ENERGY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 22, 1990

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QUESTION PRESENTED

If a stockholder wants to bring a proposal before his fellow stockholders for their vote at the corporation's annual meeting, the SEC's rules require management to include the proposal, a supporting statement, and a proxy ballot in the proxy materials for the meeting unless, *inter alia*, the proposal "deals with a matter relating to the conduct of the ordinary business operations" of the corporation.

Did the court below err in holding that under this exception management can exclude from the proxy materials all mention of a proposal to reallocate authority as between the directors and the stockholders, if there are any circumstances under which an ordinary business action might be taken under the proposed new corporate governance?

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case.

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CENTERIOR ENERGY CORPORATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.L. Grimes respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 27, 1990.

Two matters of fundamental importance—stockholder democracy and corporate governance—converge in this case. Under the reasoning of the court below, relatively few stockholder proposals dealing with corporate governance could ever be brought before the stockholders for their informed consideration. This Court has not hitherto addressed the SEC's stockholder proposal rules in any fully litigated case, and corporate governance is a lively issue and one

likely to become livelier still; we respectfully suggest that this Court's guidance is thus appropriate and timely.

I. PRELIMINARY MATTERS

A. Opinion Below

The opinion of the court below is reported at 909 F.2d 529 (D.C. Cir. 1990), and at FED. SEC. L. REP. (CCH) ¶ 95,391. It is reprinted at p. 1a of the Appendix to this Petition (hereinafter cited as "App.")

The judgment of the court below (App. 10a) affirmed an order of the United States District Court for the District of Columbia dismissing the case. That court's opinion is unreported. It is reprinted at App. 12a. The district court's order is reprinted at App. 21a.

B. Jurisdiction

The judgment below was dated July 27, 1990. Jurisdiction of this Court to review the case by writ of certiorari is conferred by 28 U.S.C § 1254(1).

C. Regulations Involved

The regulations involved, 17 C.F.R. §§ 240.14a-8 and 240.14a-9(a), are printed at App. 22a.

II. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the Court of First Instance

The court of first instance was the United States District Court for the District of Columbia. It had jurisdiction of the action under 28 U.S.C. § 1331, in that the action is a civil action arising under the laws of the United States, and under § 27 of the Securities Exchange Act of 1934, 15 U.S.C § 78aa, in that the action is based upon a violation of that Act and regulations of the SEC issued thereunder.

B. Facts Material to the Consideration of the Question Presented

Petitioner Grimes is a lawyer practicing in New York and as of the filing of the complaint below was a very substantial investor (300,000 common shares, worth some $4.8 million) in respondent Centerior, an Ohio electric utility holding company. Grimes timely advised management that he intended at the next meeting of the stockholders to offer an amendment to Centerior's articles of incorporation that would transfer the authority to make certain decisions as to capital expenditures from the board of directors acting alone, to the board and the stockholders jointly.[1] His proposal deals solely with this matter of internal corporate governance and the "constitutional" allocation of powers within the corporate structure;[2] it

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[1] Specifically, the proposal would amend the articles of incorporation of Centerior to add the following:

> "The Corporation (or in the aggregate any combination of the Corporation and/or its subsidiaries) shall not expend in any calendar year any monies by way of capital or construction expenditures in excess of the cash amount paid to the common shareholders as dividends in the preceding calendar year, without the formal prior consent of the common shareholders in each instance."

[2] As such it is squarely within the General Corporation Law of Ohio, which provides that the articles of incorporation of a corporation may set forth "[a]ny lawful provision for the purpose of defining, limiting, or regulating the exercise of the authority of . . . the directors, the officers, the shareholders, or the holders of any class of shares." OHIO REV. CODE ANN. § 1701.04 (Page 1988). In Ohio, as elsewhere, the charter (or articles of incorporation) of a corporation is a contract among the stockholders, *e.g.*, *Personal Industrial Bankers, Inc.* v. *Citizens Budget Co. of Dayton, Inc.*, 80 F.2d 327 (6th Cir. 1935), *cert. denied*, 298 U.S. 674 (1936), and it is not uncommon for charter provisions to

does not direct, forbid, or recommend any business operations, specific or general, at all.

SEC Rule 14a-8, 17 C.F.R. § 240.14a-8, commonly known as the stockholder proposal rules, provides that if a stockholder proposal and supporting statement are presented to management under prescribed conditions, management must include them in the proxy statement, and provide space on the proxy for stockholders to indicate their vote, unless the proposal falls within one or more of 13 specified excluded categories. That Grimes complied with the SEC's prescribed conditions is not in issue.

A company that has been properly notified by a stockholder that he wishes to present a proposal, but which contends that the proposal falls within one or more of the 13 excluded categories in the stockholder proposal rules, must make specified filings with the SEC setting forth why it believes that the proposal falls within one or more of the categories. SEC Rule 14a-8(d), 17 C.F.R. § 240.14a-8(d). Centerior made such filings in this instance. It contended that Grimes's proposal fell within three of the 13 excluded categories, *viz.*, proposals which would require the

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define the circumstances under which particular classes of stockholders shall have a vote with respect to corporate affairs—the commonest being, of course, a provision that preferred stock shall not vote, or shall be granted a vote only under defined circumstances, such as a default in declaring dividends. *E.g.*, *Krell* v. *Krell Piano Co.*, 23 Ohio App. 74 (1921). Grimes's proposal would simply give the common stockholders of Centerior a power to protect their interests comparable to that often enjoyed by preferred stockholders.

company to break the law,[3] proposals which deal with a matter relating to the ordinary business operations of the company,[4] and proposals which relate to specific amounts of cash or stock dividends.[5] The SEC staff issued a "no-action" letter, advising that there appeared "to be some basis for" omitting the proposal from the proxy materials on the ground that it would require the company to break the law, and that accordingly it would not recommend enforcement action to the Commission if the proposal were omitted. The staff did not address the other two exclusions claimed by Centerior. Grimes asked the Commission itself to review the staff's determination. Pursuant to its consistent practice, it declined to do so.[6]

Grimes accordingly filed the present action in the United States District Court for the District of Columbia, seeking an injunction against dissemination of proxy materials omitting Grimes's proposal. The in-

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[3] A proposal is exempted "if the proposal, if implemented, would require the [corporation] to violate any state law or Federal law of the United States . . . ." SEC Rule 14a-8(c)(2), 17 C.F.R. § 240.14a-8(c)(2).

[4] A proposal is exempted "if the proposal deals with a matter relating to the conduct of the ordinary business operations of the [corporation]." SEC Rule 14a-8(c)(7), 17 C.F.R. § 240.14a-8(c)(7).

[5] A proposal is exempted "if the proposal relates to specific amounts of cash or stock dividends." SEC Rule 14a-8(c)(13), 17 C.F.R. § 240.14a-8(c)(13).

[6] The SEC always leaves stockholder proposal matters to be handled at the staff level. This is to prevent direct judicial review by the court of appeals. See *Kixmiller* v. *SEC*, 492 F.2d 641 (D.C. Cir 1974), and *Medical Committee for Human Rights* v. *SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

junction was sought on two grounds. The first ground was that the proposal fell within none of the three excluded categories urged by Centerior and that hence the proxy statement must include the proposal and supporting statement and the proxy must afford an opportunity to direct a vote on the proposal, all under the specific requirements of Rule 14a-8. The second ground was more general. SEC Rule 14a-9(a), 17 C.F.R. § 240.14a-9(a), forbids the use of proxy materials which omit to state "any material fact necessary in order to make the statements therein not false or misleading." Grimes contended in his second count that even if his proposal fell within one of the exclusions from the stockholder proposal rules, so that management need not print it with a supporting statement in the proxy statement and supply a proxy ballot for voting on it, management was obliged under this rule against misleading proxies at least to apprise the stockholders of the fact, known to management, that Grimes would bring before the meeting this proposed major amendment to the articles of incorporation.

The district court dismissed the action. It rejected Centerior's contention that Grimes's proposal would force the company to break the law (thus reversing the SEC staff as to the only issue it had addressed), App. 19a, but held that, within the meaning of the stockholder proposal rules, the proposal dealt with a matter relating to the ordinary business operations of the company, *ibid.*, and also related to specific amounts of cash or stock dividends, App. 20a; so that it fell within both these exclusions. The district court failed to address Grimes's second contention at all, and thus held against him on it *sub silentio*.

The court of appeals affirmed, holding, on different grounds from the district court, that the proposal fell within the "ordinary business" exemption,[7] and expressing no opinion as to the exemption for proposals dealing with specific amounts of dividends. The court pointed out that under the SEC's own explanation of the "ordinary business" exemption, "only those proposals involving 'business matters that are mundane in nature and do not involve any substantial policy' considerations may be omitted" from proxy materials under that exemption. App. 6a, 909 F.2d at 531-32. It then said:

> "[T]he proposal is not limited in reach to those capital expenditure decisions involving substantial policy considerations or very large sums, but potentially extends to capital expenditures of any kind. For example, if in a given year no dividends were paid, all capital expenditure decisions for the following year, no matter how small, would have to be made by the shareholders. In such circumstances, Grimes's proposal would involve them in such minor or routine day-to-day decisions as the purchase of typewriters or the replacement of worn-out machinery. Such decisions would clearly be matters of ordinary business op-

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[7] The district court (overlooking the fact that Grimes's proposal dealt only with corporate powers and not with their exercise) had reasoned that because Ohio law imposes an obligation to make those capital expenditures that are necessary to ensure adequate service to its customers, decisions concerning such expenditures might be matters of "ordinary business." The court below observed that the district court's "conclusion does not necessarily follow from the fact that Centerior regularly must make capital expenditures to fill its public service obligations . . . ." App. 7a, 909 F.2d at 532.

eration. Centerior thus properly determined that Grimes's proposal fell within [the 'ordinary business' exemption]."

App. 7a-8a, 909 F.2d at 532-33.[8]

III. THE WRIT SHOULD BE ALLOWED BECAUSE THE QUESTION PRESENTED IS AN IMPORTANT ONE WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. The Court Below's Interpretation of the SEC's Stockholder Proposal Rules Undercuts Those Rules By Effectively Precluding Most Proposals for Reform of Corporate Governance From Being Brought Before the Stockholders.

The court below's reasoning as to the "ordinary business" exemption is a *non sequitur*. That exemption is self-evidently meant to keep stockholders from harassing their fellows (and management) with idiosyncratic ideas as to how minor, mundane day-to-day matters should be handled—as is amply confirmed by the SEC's own interpretation quoted by the court below, App. 5a-6a. By its own terms the exemption deals with *operations*—the *exercise* of power—and has nothing to do with *corporate governance*—the *alloca-*

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[8] On Grimes's second count, the court below held that a proposal falling within one of the exclusions from the stockholder proposal rules need not even be mentioned in the proxy statement. Its reasoning was apparently that, however significant the proposal might be and notwithstanding management's knowledge that it would be brought up from the floor at the meeting, the stockholders need only be apprised of proposals which are "proper" subjects for stockholder action, and that the 13 enumerated exemptions to the SEC's stockholder proposal rules define what is and is not a "proper" subject for stockholder action. App. 9a, 909 F.2d at 533.

tion of power. (Grimes's proposal, of course, deals with corporate governance and not with operations.)

Even under the court's own interpretation of the exemption, the logical inquiry was whether Grimes's proposal involved "substantial policy considerations." (Obviously it did: what policy question could be more substantial than the redistribution of power among the organs of the corporation?) But the court below made no such inquiry. Rather, it inquired whether, *if* authority were conferred on an organ of the corporation by the adoption of Grimes's proposal, there might *subsequently* be any hypothetical circumstances under which that organ might take action in an "ordinary business" matter. This inquiry—for lack of a better term, we will call it the "any subsequent action" test—is simply irrelevant.

From this illogical "any subsequent action" test flow the broad implications of the decision below that warrant grant of the writ. *For under this test, management could exclude from proxy materials almost every stockholder proposal for the reform of corporate governance.* Does a stockholder want to propose cumulative voting for the board of directors? Management could exclude that from the proxy materials, for the cumulatively-elected board might have to vote on an ordinary business operation. Does a stockholder want to propose that management salaries be set by a committee of outside directors? Management could exclude that from the proxy materials, on the ground that setting salaries is an ordinary business activity. Does a stockholder want to propose that the preferred stockholders be authorized to elect the board if three successive dividends are passed? Management could exclude that from the proxy materials, on the ground

that the board so elected might pass on an ordinary business matter. Indeed, it is not easy to devise a proposal for reform of corporate governance that *would* pass muster under the "any subsequent action" test of the court below.

B. The Question Presented Is Appropriate for Consideration by This Court at This Time.

The stockholder proposal rules—which this Court has never examined in depth—are the cornerstone of stockholder democracy, affected, as the court below long ago said in another case, with an "overriding" public interest "in assuring shareholders the right to control the important decisions which affect corporations." *Medical Committee for Human Rights* v. *SEC*, 432 F.2d 659, 680-81 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). Corporate governance is a subject of intense current interest (having, for example, been the subject of close and controversial scrutiny by the American Law Institute for much of the past decade); in the age of hostile takeovers, poison pills, golden parachutes, and all the rest, no "decisions which affect corporations" are more important than those dealing with corporate governance; yet the reasoning of the court below would substantially foreclose consideration of stockholder proposals on that subject.

For the decision below to remain on the books is doubly pernicious because few cases under the stockholder proposal rules reach the courts of appeals; obviously this is because the SEC forces proposers to resort to the district courts in the first instance, see footnote 6 *supra*, and most proposers will abandon their efforts if they fail to secure preliminary relief against distribution of the proxy materials. The issue

is thus not one as to which prudence suggests that this Court await the ripening of a developed jurisprudence at the court of appeals level. We respectfully submit that this Court's consideration of this question now is timely and much needed.[9]

We also respectfully suggest that the views of the United States be sought, since the SEC was not a party to the litigation and the decision below goes to the heart of its enforcement of stockholder democracy.

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[9] As noted *supra* note 8, in ruling that management could refuse even to mention to the stockholders in the proxy statement that Grimes's proposal would be made at the meeting, the court's reasoning was apparently that the stockholders need only be apprised of proposals which are "proper" subjects for stockholder action, and that the 13 enumerated exemptions to the SEC's stockholder proposal rules define what is and is not a "proper" subject for stockholder action. We confess that we do not follow this reasoning. Even on its own terms, not only does it overlook the fact that the very first of the 13 enumerated exemptions is for proposals which are "not a proper subject for action by security holders" under "applicable state law," SEC Rule 14a-8(c)(1), 17 C.F.R. § 240.14a-8(c)(1) (it has never been suggested that this exclusion was here applicable, or that Grimes's proposal was not a proper subject for action by the stockholders, see note 2 *supra*); but also it ignores the fact that only a few weeks previously the very same court (almost the very same panel) had firmly rejected the notion that the SEC has any authority to define the proper subjects of stockholder action, or, as the court put it, to "step beyond control of voting procedure and into the distribution of voting power . . . ." *Business Roundtable* v. *SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990). While the implications of this issue are not of the same magnitude as those of the primary issue, it presents a question of great practical significance in the administration of the stockholder proposal rules which should be settled by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 22, 1990

APPENDIX

APPENDIX A

Opinion of the Court Below

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 9, 1990 Decided July 27, 1990

No. 89-7053

C.L. GRIMES, APPELLANT

v.

CENTERIOR ENERGY CORPORATION

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 89-00386)

Thaddeus Holt for appellant.

Scott T. Kragie, with whom *Donald T. Bucklin* was on the brief, for appellee.

Before BUCKLEY, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: Mr. C.L. Grimes, a shareholder of the Centerior Energy Corporation, seeks to compel Cen-

terior to include a proposed amendment to its articles of incorporation in its proxy materials, claiming that it is required to do so by Securities and Exchange Commission Rule 14a-8. Grimes appeals the district court's dismissal of his complaint. We find that the district court correctly determined that Grimes's proposal dealt with a matter relating to the conduct of Centerior's ordinary business operations and thus could be omitted from the proxy materials under an exemption to Rule 14a-8. We also hold that the failure of the proxy materials to apprise shareholders that Grimes would offer his proposal at the forthcoming shareholders' meeting did not render them misleading in violation of Rule 14a-9.

I. Background

Centerior is an Ohio corporation whose shares are traded on a national securities exchange. It owns two Ohio public utilities, The Cleveland Electric Illuminating Company and The Toledo Edison Company, which generate, transmit, and distribute electric power in northern Ohio and are regulated by the Public Utilities Commission of Ohio. At the time he initiated this suit, Grimes owned 300,000 shares of Centerior's common stock, worth approximately $4.8 million. Centerior's articles of incorporation and by-laws vest sole authority to make capital expenditures in its board of directors.

In October 1988, Grimes sent Centerior a proposed amendment to its articles of incorporation and a supporting statement, requesting that they be included in the proxy materials distributed for action at the next shareholders' meeting. The proposed amendment provides as follows:

> The Corporation (or in the aggregate any combination of the Corporation and/or its subsidiaries) shall not expend in any calendar year any monies by way of capital or construction expenditures in excess of the cash amount paid to the common shareholders as dividends in the preceeding [sic] calendar year,

> without the formal prior consent of the common shareholders in each instance.

Letter from C.L. Grimes to Richard Miller (Oct. 5, 1988).

Rule 14a-8 of the Securities and Exchange Commission requires Centerior to include in its proxy statement any proposal submitted for action by a shareholder unless it falls within one of thirteen exemptions, three of which are invoked by Centerior. *See* 17 C.F.R. § 240.14a-8 (1989). The relevant parts of Rule 14a-8 read as follows:

> (c) The [corporation] may omit a proposal and any statement in support thereof from its proxy statement ... under any of the following circumstances:
>
> ....
>
> (2) If the proposal, if implemented, would require the [corporation] to violate any state law ....
>
> ....
>
> (7) If the proposal deals with a matter relating to the conduct of the ordinary business operations of the [corporation];
>
> ....
>
> (13) If the proposal relates to specific amounts of cash or stock dividends.

17 C.F.R. § 240.14a-8(c)(2), (7), (13) (hereinafter exemptions 2, 7, and 13, respectively). If the corporation determines that a shareholder proposal falls within one of the enumerated exemptions, it must file the proposal and its supporting statement with the SEC, together with a statement of the reasons why the proposal need not be included in the corporation's proxy materials. 17 C.F.R. § 240.14a-8(d).

Centerior determined that Grimes's proposal fell within exemptions 2, 7, and 13, and made the requisite filing with the Commission. The SEC staff issued a "no-action" letter advising Centerior that there appeared "to be some basis for" omitting Grimes's proposal from its proxy statement

under exemption 2 because the proposal might result in a violation of provisions of Ohio law regulating the expenditures and dividends of public utilities. *Centerior Energy Corp.*, SEC No-Action Letter (Jan. 10, 1989) (LEXIS, Fedsec library, Noact file). The staff thus advised that it would not "recommend any enforcement action to the [SEC] if the Company omit[ted] the proposal from its proxy materials," and did not address the other exemptions asserted by Centerior. *Id.* Grimes asked the Commission to review the staff's determination, but it declined to do so.

Grimes then brought suit against Centerior, offering alternative grounds for seeking an injunction against dissemination of any proxy materials that omitted his proposal. First, Grimes asserted that the omission of his proposal would violate Rule 14a-8. Second, he contended that a failure to inform the shareholders that he would offer a major amendment to Centerior's articles of incorporation at the shareholders' meeting would be inherently misleading in violation of SEC Rule 14a-9, 17 C.F.R. § 240.14a-9(a), which provides that proxy materials may not contain false or misleading statements or omissions with respect to any material fact. After a hearing on Grimes's motion for a preliminary injunction and Centerior's motion to dismiss, the district court found that the case presented no factual issues, denied the injunction, and dismissed the complaint. *C.L. Grimes v. Centerior Energy Corp.*, Civ. No. 89-0386, mem. op. (D.D.C. Mar. 2, 1989) ("Memorandum").

The court held that Grimes's proposal would not *require* Centerior to violate provisions of Ohio law, and thus was not exempt from inclusion under exemption 2. *Id.* at 7-9. The court went on to find, however, that Grimes's proposal was covered by exemptions 7 and 13. First, it reasoned that the proposed amendment related to the conduct of Centerior's ordinary business operations because Centerior might be required to make certain capital expenditures to ensure that its utilities met the public service obligations imposed on them by state law. *Id.* at

9-10. Second, the court concluded that the proposal related to a specific amount of dividends because if they were to avoid the need for shareholder approval, the directors would have to vote cash dividends in any given year in an amount at least equal to the proposed capital expenditures for the following year. *Id.* at 10. The court did not address Grimes's alternative claim under Rule 14a-9. Grimes brought this appeal.

II. Discussion

Grimes argues that his proposal did not deal with matters relating to the conduct of Centerior's ordinary business operations or to specific amounts of dividends and thus did not fall within either exemption 7 or 13. He contends further that even if his proposal falls within one of these exemptions, the failure to apprise shareholders of his intent to offer a major amendment at the next shareholders' meeting would render the proxy materials misleading in violation of Rule 14a-9, and that the district court erred by effectively ruling against him on this claim. Grimes thus urges us to direct the district court to order Centerior to schedule and hold a supplemental session of the 1989 shareholders' meeting and to distribute proxy materials containing his proposal. We conclude that Grimes's proposal was properly excluded from Centerior's proxy materials under exemption 7, and express no opinion as to the applicability of exemption 13. Finally, we hold that the failure to mention a properly excluded shareholder proposal in the proxy materials does not render them misleading in violation of Rule 14a-9.

A. Exemption 7

Whether Grimes's proposal falls within exemption 7 obviously depends on the meaning of the phrase "ordinary business operations." Unfortunately, the phrase has no precise definition. When the SEC adopted Rule 14a-8(c)(7) in its current form, it explained that

> the term "ordinary business operations" has been deemed on occasion to include certain matters which

> have significant policy, economic or other implications inherent in them. For instance, a proposal that a utility company not construct a proposed nuclear power plant has in the past been considered excludable under [the former version of this exemption]. In retrospect, however, it seems apparent that the economic and safety considerations attendant to nuclear power plants are of such magnitude that a determination whether to construct one is not an "ordinary" business matter. Accordingly, proposals of that nature, as well as others that have major implications, will in the future be considered beyond the realm of an issuer's ordinary business operations ....

Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,998 (1976). Thus, only those proposals involving "business matters that are mundane in nature and do not involve any substantial policy" considerations may be omitted under exemption 7. *Id.* This exemption is premised on the notion that "management cannot exercise its specialized talents effectively if corporate investors assert the power to dictate the minutiae of daily business decisions." *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 679 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

From its no-action letters, it is clear that the SEC staff typically regards proposals bearing on a company's capital expenditures as relating to ordinary business operations. *See, e.g., Florida Power & Light Co.*, SEC No-Action Letter (Jan. 18, 1983) (LEXIS, Fedsec library, Noact file) ("the determination of whether or not to ... reduce capital expenditures ... [is a] matter[ ] relating to the Company's ordinary business operations"); *Allis-Chalmers*, SEC No-Action Letter (Mar. 3, 1982) (LEXIS, Fedsec library, Noact file) (proposal to restrict capital investment to existing facilities relates to conduct of ordinary business operations); *Middle South Utilities, Inc.*, SEC No-Action Letter (Feb. 24, 1981) (LEXIS, Fedsec library, Noact file) (proposal to reduce capital expenditures relates to conduct of ordinary business operations); *General Public Utilities Corp.*, SEC No-Action Letter (Feb. 21, 1980) (LEXIS,

Fedsec library, Noact file) (proposal to halt current capital expenditures for new generating capacity for all but emergency situations relates to the conduct of ordinary business operations).

In some cases, however, the SEC staff has found a proposal relating to capital expenditures to be sufficiently important to remove it from the realm of "ordinary business operations." *See Detroit Edison Co.*, SEC No-Action Letter (Feb. 13, 1980) (LEXIS, Fedsec library, Noact file) (proposal requiring that any project whose capital expenditure would exceed half a billion dollars be subject to shareholder approval did not fall within exemption 7 because "a capital expenditure of five hundred million dollars has such major implications for the future of the Company that it transcends the realm of ordinary business operations"); *see also General Public Utilities Corp.*, SEC No-Action Letter (Mar. 11, 1980) (LEXIS, Fedsec library, Noact file) (proposal to focus new power plant construction on non-nuclear sources of energy not within exemption 7 because it involved "broad policy considerations beyond the Company's ordinary business").

In determining that Grimes's proposal related to the conduct of Centerior's ordinary business operations, the district court recognized that large capital expenditures might fall outside of "ordinary business operations." Memorandum at 9. The court reasoned, however, that because Ohio law imposes an obligation to make those capital expenditures that are necessary to ensure adequate service to its customers, decisions concerning such expenditures might be matters of "ordinary business." *Id.* at 10. Although the court's conclusion does not necessarily follow from the fact that Centerior regularly must make capital expenditures to fulfill its public service obligations, it is clear that it arrived at the proper result.

Under Grimes's proposal, whether shareholder approval is required for the current year's capital expenditures depends on the level of the previous year's dividends. Thus, the proposal is not limited in reach to those capital

expenditure decisions involving substantial policy considerations or very large sums, but potentially extends to capital expenditures of any kind. For example, if in a given year no dividends were paid, all capital expenditure decisions for the following year, no matter how small, would have to be made by the shareholders. In such circumstances, Grimes's proposal would involve them in such minor or routine day-to-day decisions as the purchase of typewriters or the replacement of worn-out machinery. Such decisions would clearly be matters of ordinary business operations. Centerior thus properly determined that Grimes's proposal fell within exemption 7.

B. Rule 14a-9

The district court did not address Grimes's claim that proxy materials omitting mention of the fact that he would offer a major proposal at the shareholders' meeting would be inherently misleading in violation of Rule 14a-9, thus ruling against him *sub silentio*. In support of his claim, Grimes relies on the following language from *New York City Employees' Retirement Sys. v. American Brands, Inc.*, 634 F. Supp. 1382 (S.D.N.Y. 1986):

> Since a shareholder may present a proposal at the annual meeting regardless of whether the proposal is included in a proxy solicitation, the corporate circulation of proxy materials which fail to make reference to a shareholder's intention to present a *proper* proposal at the annual meeting renders the solicitation inherently misleading.

Id. at 1386 (emphasis added) (reasoning, from cases holding that Rule 14a-9 provides a private right of action, that such a right also exists under Rule 14a-8). *American Brands* actually stands for a somewhat different proposition than the one for which it is cited. It holds that the omission of a proposal *not* properly excludable under Rule 14a-8(c) will necessarily be misleading under Rule 14a-9, whereas the issue presented in this case is whether a proposal *properly* excluded under Rule 14a-8 must neverthe-

less be mentioned to avoid misleading shareholders under Rule 14a-9. Moreover, we can find no authority that does speak to this issue.

We note, however, that the regulations were originally designed to limit proposals to those that were proper subjects for shareholder action under applicable state law. *See Medical Comm. for Human Rights*, 432 F.2d at 677-78. The subsequent development of enumerated exemptions in Rule 14a-8(c) serves to define the "proper subjects" for such action. Therefore, if a proposal falls outside the range of "proper subjects," as implicitly defined by Rule 14a-8(c), neither the proposal itself nor the fact that its sponsor intends to present the proposal at the next shareholders' meeting need be included in the proxy materials. The interpretation urged by Grimes would clearly subvert the purpose of the exemptions to Rule 14a-8.

III. Conclusion

Grimes's proposal fell within exemption 7 of Rule 14a-8 and was therefore properly excluded from Centerior's proxy materials. Moreover, the failure to mention a proposal properly excluded under Rule 14a-8(c) does not render a proxy statement misleading under Rule 14a-9. The district court's order denying the injunction and dismissing Grimes's complaint is therefore

Affirmed.

APPENDIX B

The Judgment Sought To Be Reviewed

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

No. 89-7053

D.C. Civil No. 89-0386

C. L. Grimes,

Appellant

v.

Centerior Energy Corporation

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 27 1990

CONSTANCE L. DUPRÉ
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: **BUCKLEY, WILLIAMS** and **D.H. GINSBURG,** Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of

Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupré
CONSTANCE L. DUPRE, CLERK

APPENDIX C

Opinion of the District Court

(Minor Typographical Errors Corrected)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-0386 JGP

C. L. GRIMES,

Plaintiff

v.

CENTERIOR ENERGY CORPORATION,

Defendant

FILED

MAR 2 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

In this action, the plaintiff, an individual stockholder in the defendant corporation, "seeks to require defendant to comply with the law and the rules of the Securities and Exchange Commission [SEC] by including, in a forthcoming proxy statement with respect to the defendant's annual meeting, information with respect to an amendment to the defendant's articles of incorporation proposed by plaintiff." Complaint par. 1. Plaintiff contends that this court has jurisdiction over this proceeding pursuant to §27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, "in that it is based upon a violation of the Act and rules aforesaid, and more particularly upon violations of §14(a) of the said Act, 15 U.S.C. §§78n, and SEC Rule 14a-8 and 14a-9, 17 C.F.R. §§240.14a-8 and 240.14a-9." Complaint par. 2.

The case is now before the Court on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss, or in the alternative, to transfer to the United States District Court for the Northern District of Ohio. With respect to the plaintiff's motion, the parties have agreed that the hearing on the motion for a preliminary injunction may be consolidated with a trial on the merits. *See* Fed. R. Civ. P. 65(a)(2). The parties also agree that there are no factual issues. The Court heard the motion on February 27, 1989.

After giving careful consideration to the motions, the Court concludes that plaintiff's motion for a preliminary injunction should be denied and that this case should be dismissed.

The subject proxy materials are to be mailed to the stockholders on or about March 13, 1989, and the annual stockholders' meeting will be held on April 25, 1989. In view of those time constraints, the Court will briefly set forth the underlying facts and the basis for its ruling.

I

The material facts are as follows: The plaintiff is a holder of 300,000 shares of common stock in the defendant having a market value in excess of 4.8 million dollars as the close of business February 10, 1989. Complaint par. 4. Defendant is a holding company whose subsidiaries are engaged in the generation, transmission and distribution of electric power. It is organized and existing under the laws of the state of Ohio and is subject to the securities laws of the United States and to regulation by, and the rules of, the Securities and Exchange Commission (SEC). The defendant is a "registrant" within the meaning of 17 C.F.R. §240.14a-8[1], and the issuance and distribution of

[1] "The term 'registrant' means the issuer of the securities in respect of which proxies are to solicited." 17 C.F.R. 240.a-1(h)

the proxy materials involved in this action are subject to those laws, regulations and rules. Complaint par. 5.

Under defendant's articles of incorporation and by-laws, the authority to make capital expenditures is vested solely in the board of directors (and in the executive committee thereof under certain circumstances). Complaint par. 6.

By letter dated October 5, 1988, plaintiff sent to defendant a proposed amendment to defendant's articles of incorporation pursuant to which such expenditures in excess of a defined amount would require the approval of stockholders, and requested that the proposal and a statement in support thereof be included in the proxy materials for the next regular or special meeting of the stockholders of the corporation. Complaint par. 7 and Exhibit 1 thereto. The proposed amendment provided:

> The Corporation (or in the aggregate any combination of the Corporation and/or its subsidiaries) shall not expend in any calendar year any monies by way of capital or construction expenditures in excess of the cash amount paid to the common shareholders as dividends in the preceding calendar year, without the formal prior consent of the common shareholders in each instance.

Complaint Exhibit 1. By letter dated December 1, 1988, to the Office of Chief Counsel, Division of Corporate Finance of the SEC, situated in this district, with a copy to plaintiff, defendant advised the SEC and plaintiff of its intention to omit plaintiff's proposal from its proxy statement relating to the annual stockholders' meeting scheduled to be held on April 25, 1989. Complaint par. 12. In that letter the defendant stated its intention to deliver preliminary proxy materials to the SEC on or before February 2, 1989, and to mail the proxy materials to the stockholders on or about March 13, 1989. *Id.* The defendant attached to its letter a "Statement of Intent to

Omit Shareholder Proposal" (Statement) in which it outlined the reasons for its decision to omit the plaintiff's proposal from the proxy material. Complaint Exhibit 3.

In its Statement, the defendant noted three reasons in support of its decision. First, the defendant contended that the proposed amendment would require the defendant's subsidiaries to violate the state law of Ohio. *See* 17 C.F.R. §240.14a-8(c)(2). Second, the defendant contended that the proposed amendment deals with a matter relating to the conduct of ordinary business of the defendant and its subsidiaries. *See* 17 C.F.R. §240.14a-8(c)(7). Finally, the defendant contended that the proposed amendment relates to specific amounts of cash or stock dividends. *See* 17 C.F.R. §240.14a-8(c)(13). On the same date, defendant submitted the legal opinion of its Assistant General Counsel to the SEC. Complaint par. 13 and Exhibit 4 thereto.

In a letter dated January 10, 1989, the SEC responded to defendant, with a copy to plaintiff. Complaint Exhibit 5. Enclosed with the letter was a "Response of the Office of Chief Counsel Division of Corporation Finance" (Response). Complaint Exhibit 6. The Response provides in part:

> The proposal relates to the amount of capital expenditures that can be made in relation to the amount of dividends that are declared.
>
> There appears to be some basis for your opinion that to the extent that the proposal links the amount of capital expenditures to dividend payments it may be omitted pursuant to Rule 14a-8(c)(2) since it *may* result in a violation of the Ohio Revised Code ("ORC") provisions regulating the activities of the Company. In arriving at our position, the staff has particularly noted that ORC section 4905.22 requires the Company to make such expenditures as are necessary to "furnish necessary and adequate (public utility) service and

> facilities" and that ORC section 1701.33 provides that the Company may pay dividends only out of its surplus.

Id. (emphasis the Court's).

By a letter dated January 25, 1989, the plaintiff requested the full SEC to review the above determination by the staff. Complaint par. 16 and Exhibit 8 thereto. The SEC declined to do so. Plaintiff's Exhibit 1[2].

II

In view of the time constraints, the Court will address only those issues which are pertinent to its decision in this case.

Defendant seeks to have the Court dismiss the case for lack of jurisdiction or lack of waiver, or in the alternative to transfer the case to the United States District Court for the Northern District of Ohio. Although time does not permit a extensive examination of the question of jurisdiction, the Court concludes that it does have jurisdiction over this matter and that venue is proper. *See, Hodgdon v. Needham-Skyles Oil Co.*, 556 F.Supp 75 (D.D.C. 1982). *See also, Hirt v. UM Leasing Corp.*, 614 F.Supp. 1066, 1069 (D.Neb. 1985). Moreover, in view of the short time before the mailing of the proxy statements, the Court will not transfer this action.

As was noted above, although this comes before the Court on the plaintiff's motion for a preliminary injunction and the defendant's motion to dismiss or transfer, the parties have agreed that the plaintiff's motion may be consolidated with a hearing on the merits. Since there is not a factual dispute, the Court may address the case without the need for testimony or other evidence.

---

[2] Plaintiff's Exhibit 1 was filed in Court at the time of the hearing.

Normally, when a stockholder of the registrant seeks to present a proposal, or in this case, a proposed amendment of the articles of incorporation or by-laws, the registrant is required to set forth the proposal in its proxy statement to the other stockholders, provided that the proponent has met all requirements. 17 C.F.R. §240.14a-8. The Court assumes, based upon the present record and the arguments of counsel, that the plaintiff has satisfied the necessary requirements and that the proposed amendment was properly before the registrant. The rules provided that a registrant may omit a proposal and any statement in support thereof under several circumstances, three of which are raised in this case. 17 C.F.R. §240-14a-8(c).

First, defendant contends that the proposal need not be included in the proxy statement because it would require the registrant to violate the Ohio law. The Division of Corporate Finance, SEC, advised that it would not recommend any enforcement action requiring defendant to include the proposal amendment in the proxy statement because it concluded that the proposal amendment, if adopted, *may* result in a violation of state law. The rules provide, in part, that the proposal need not be included: "If the proposal, if implemented, *would* require the registrant to violate any state law." 17 C.F.R. §240.14a-8(c)(2) (emphasis the Court's). Defendant argues that management cannot satisfy their statutory obligations under Ohio law unless management retains the freedom to set and adjust the level of capital expenditures.

There is no question but that this argument has some merit. Defendant's subsidiaries are electric power companies which are regulated by the state. It could be that under the law, the company would be required to make certain capital expenditures in a given year that are in excess of the amount of the case dividends paid during the previous year. That would raise a need for stockholder action which would in turn raise other questions concerning the timeliness of any action by the stockholders. In

this connection, defendant noted in its Statement that the amount of capital expenditures for the years 1985, 1986 and 1987 far exceeded the amount of cash dividends paid to the stockholders in the preceding years. For example, the company paid out cash dividends in 1984 in the amount of 245 million dollars while in the following year it expended 984 million dollars for construction. In 1984 it paid out cash dividends in the amount of 268 million dollars but spent over one billion dollars for capital expenditures.

There seems to be little doubt that the plaintiff's proposed amendment is directed at this imbalance. In his letter proposing the amendment he complains about dividends "hav[ing] been cut drastically". Complaint Exhibit 1. He notes that:

> There can be no excuse for reducing our dividends and complaining about inadequate returns, **while pouring our money into new construction.** Neither management nor any Ohio regulator can complain that requiring us to approve a capital expenditure at the shareholder level is too expensive or cumbersome, because it is our money which will be spent seeking to obtain *our* approval.

Id. (bold supplied by the Court). He then states that if management cannot receive a fair return, perhaps the monies should be invested elsewhere. *Id.*

While it is clear why the plaintiff has made his proposal, he apparently seeks to have the defendant or its subsidiary companies cut back on the amount of capital expenditures, passage of the proposed amendment would not insure that result. If the amendment was passed, any request for capital expenditures in excess of the prior year's cash dividends would be submitted to the stockholders, but that does not mean that the stockholders would vote to violate the state law, or that the defendant company would ultimately violate the state law. Nevertheless, the potential

is present and that appears to be exactly what the plaintiff seeks. This much is made clear by his letter, Complaint Exhibit 1, and by the past history of the company in which the amount of capital expenditures have exceeded the previous year's cash dividends for the past three years up to 1987. The returns are not in for the capital expenditures for 1988.

The proposed amendment *may* make the company violate a state law, but the rule speaks in terms of *requiring* the registrant to violate the state law. Apparently SEC has read this case situation as falling within Section 240.14a-8(c)(2). Based upon the present record, this Court cannot conclude that the proposal will require the registrant to violate state law, notwithstanding that such a result may be intended by the plaintiff; accordingly, the Court concludes that Section 240.14a-8(c)(2) standing alone is not a sufficient reason for defendant to refuse to send the proposed amendment to the stockholders.

The second argument made by the defendant is that the proposed amendment may be omitted from the proxy statement because it relates to the conduct of the ordinary business operations of the company. 17 C.F.R. §240.14a-8(c)(7). Here again it is questionable whether the expenditure of huge sums of money falls within the term "conduct of ordinary business operations." That term usually refers to the day-to-day operations where the management must have freedom to operate and of course would not extend to broad policy matters. It would seem in this case, however, that the term might encompass a requirement under state law that management make certain capital expenditures in order to bring or keep the utility in compliance with state law. For example, the utility must furnish electricity, and if the product cannot be furnished without a capital expenditure, then the directors are required to make that expenditure. This appears to relate to the conduct of ordinary business.

Finally, the proposed amendment is not required if the proposal relates to specific amounts of cash or stock dividends. 17 C.F.R. §240.14a-8(c)(13). The proposal refers to specific amounts of cash in that it would establish a formula which may come into play depending upon the circumstances. For example, if the company projected capital expenditures for 1990 in an amount of 500 million dollars, then under the proposal, in order to insure funds to make those capital outlays, the directors would be required to pay cash dividends in 1988 in an amount equal to or greater than the proposed capital expenditure. Under these circumstances, the proposed amendment relates to specific amount of cash or stock dividends.

Under these circumstances, the Court concludes that the defendant is not required to include the proposal in the proxy statement. Having reached this result, it follows that plaintiff is not entitled to a preliminary injunction and this case must be dismissed.

An appropriate order has been entered.

March 2, 1989

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

APPENDIX D

Order of the District Court Dismissing the Action

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-0386 JGP

C. L. GRIMES,

Plaintiff

v.

CENTERIOR ENERGY CORPORATION,

Defendant

FILED

FEB 28 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Pursuant to the Memorandum to be filed, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is denied, and it is further

ORDERED that this case is dismissed with prejudice.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

APPENDIX E

Regulations Involved

17 C.F.R.§ 240.14a-8

(SEC Rule 14a-8, the Stockholder Proposal Rules)

(a) If any security holder of a registrant notifies the registrant of his intention to present a proposal for action at a forthcoming meeting of the registrant's security holders, the registrant shall set forth the proposal in its proxy statement and identify it in its form of proxy and provide means by which security holders can make the specification required by Rule 14a-4(b) [17 CFR 240.14a-4(b)]. Notwithstanding the foregoing, the registrant shall not be required to include the proposal in its proxy statement or form of proxy unless the security holder (hereinafter, the "proponent") has complied with the requirements of this paragraph and paragraphs (b) and (c) of this section:

(1) *Eligibility.* At the time he submits the proposal, the proponent shall be a record or beneficial owner of at least 1% or $1000 in market value of securities entitled to be voted on the proposal at the meeting and have held such securities for at least one year, and he shall continue to own such securities through the date on which the meeting is held. If the registrant requests documentary support for a proponent's claim that he is the beneficial owner of at least 1% or $1000 in market value of such voting securities of the registrant or that he has been a beneficial owner of the securities for one or more years, the registrant shall make such request within 14 calendar days after receiving the security holder proposal and the proponent shall furnish appropriate documentation within 21 calendar days after receiving the request. Appropriate documentation of the proponent's claim of beneficial ownership shall include:

(i) A written statement by a record owner or an independent third party, accompanied by the proponent's writ-

ten statement that the proponent intends to continue ownership of such securities through the date on which the meeting is held; or

(ii) A copy of a Schedule 13D (§ 240.13d-101 of this chapter), Schedule 13G (§ 240.13d-102 of this chapter), Form 13F (§ 249.325 of this chapter), Form 3 (§ 249.103 of this chapter) and/or Form 4 (§ 249.104 of this chapter), or amendments thereto, filed with the Commission and furnished to the registrant by the proponent, provided that such filings indicate the proponent's beneficial ownership as of or prior to the date on which the relevant one year period commences, and are supported by

(A) A copy of all subsequent amendments reporting a change in ownership level,

(B) The proponent's affidavit, declaration, affirmation or other similar document provided for under applicable state law attesting that the proponent continued to be the beneficial owner of at least 1% or $1000 in market value of such voting securities of the registrant throughout the required one year period and as of the date of the affidavit, declaration, affirmation or other similar document provided for under applicable state law, and

(C) The proponent's written statement that the proponent intends to continue ownership of such securities through the date on which the meeting is held. In the event the registrant includes the proponent's proposal in its proxy soliciting material for the meeting and the proponent fails to comply with the requirement that he continuously hold such securities through the meeting date, the registrant shall not be required to include any proposals submitted by the proponent in its proxy material for any meeting held in the following two calendar years.

(2) *Notice and Attendance at the Meeting.* At the time he submits a proposal, a proponent shall provide the registrant in writing with his name, address, the number of

the registrant's voting securities that he holds of record or beneficially, the dates upon which he acquired such securities, and documentary support for a claim of beneficial ownership. A proposal may be presented at the meeting either by the proponent or his representative who is qualified under state law to present the proposal on the proponent's behalf at the meeting. In the event that the proponent or his representative fails, without good cause, to present the proposal for action at the meeting, the registrant shall not be required to include any proposals submitted by the proponent in its proxy soliciting material for any meeting held in the following two calendar years.

(3) *Timeliness.* The proponent shall submit his proposal sufficiently far in advance of the meeting so that it is received by the registrant within the following time periods:

(i) *Annual Meetings.* A proposal to be presented at an annual meeting shall be received at the registrant's principal executive offices not less than 120 calendar days in advance of the date of the registrant's proxy statement released to security holders in connection with the previous year's annual meeting of security holders except that if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a proposal shall be received by the registrant a reasonable time before the solicitation is made.

(ii) *Other Meetings.* A proposal to be presented at any meeting other than an annual meeting specified in paragraph (a)(3)(i) of this section shall be received a reasonable time before the solicitation is made.

NOTE: In order to curtail controversy as to the date on which a proposal was received by the registrant, it is suggested that proponents submit their proposals by Certified Mail—Return Receipt Requested.

(4) *Number of Proposals.* The proponent may submit no more than one proposal and an accompanying supporting statement for inclusion in the registrant's proxy materials for a meeting of security holders. If the proponent submits more than one proposal, or if he fails to comply with the 500 word limit mentioned in paragraph (b)(1) of this section, he shall be provided the opportunity to reduce the items submitted by him to the limits required by this rule, within 14 calendar days of notification of such limitations by the registrant.

(b)(1) *Supporting Statement.* The registrant, at the request of the proponent, shall include in its proxy statement a statement of the proponent in support of the proposal, which statement shall not include the name and address of the proponent. A proposal and its supporting statement in the aggregate shall not exceed 500 words. The supporting statement shall be furnished to the registrant at the time that the proposal is furnished, and the registrant shall not be responsible for such statement and the proposal to which it relates.

(2) *Identification of Proponent.* The proxy statement shall also include either the name and address of the proponent and the number of shares of the voting security held by the proponent or a statement that such information will be furnished by the registrant to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor.

(c) The registrant may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal is, under the laws of the registrant's domicile, not a proper subject for action by security holders.

NOTE: Whether a proposal is a proper subject for action by security holders will depend on the applicable state law.

Under certain states' laws, a proposal that mandates certain action by the registrant's board of directors may not be a proper subject matter for shareholder action, while a proposal recommending or requesting such action of the board may be proper under such state laws.

(2) If the proposal, if implemented, would require the registrant to violate any state law or Federal law of the United States, or any law of any foreign jurisdiction to which the registrant is subject, except that this provision shall not apply with respect to any foreign law compliance with which would be violative of any state law or Federal law of the United States.

(3) If the proposal or the supporting statement is contrary to any of the Commission's proxy rules and regulations, including Rule 14a-9 [§ 240.14a-9 of this chapter], which prohibits false or misleading statements in proxy soliciting materials;

(4) If the proposal relates to the redress of a personal claim or grievance against the registrant or any other person, or if it is designed to result in a benefit to the proponent or to further a personal interest, which benefit or interest is not shared with the other security holders at large;

(5) If the proposal relates to operations which account for less than 5 percent of the registrant's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the registrant's business;

(6) If the proposal deals with a matter beyond the registrant's power to effectuate;

(7) If the proposal deals with a matter relating to the conduct of the ordinary business operations of the registrant;

(8) If the proposal relates to an election to office;

(9) If the proposal is counter to a proposal to be submitted by the registrant at the meeting;

(10) If the proposal has been rendered moot;

(11) If the proposal is substantially duplicative of a proposal previously submitted to the registrant by another proponent, which proposal will be included in the registrant's proxy material for the meeting;

(12) If the proposal deals with substantially the same subject matter as a prior proposal submitted to security holders in the registrant's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding five calendar years, it may be omitted from the registrant's proxy materials relating to any meeting of security holders held within three calendar years after the latest such previous submission: Provided, That—

(i) If the proposal was submitted at only one meeting during such preceding period, it received less than three percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than six percent of the total number of votes cast in regard thereto; or

(iii) If the prior proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; or

(13) If the proposal relates to specific amounts of cash or stock dividends.

(d) Whenever the registrant asserts, for any reason, that a proposal and any statement in support thereof received from a proponent may properly be omitted from its proxy statement and form of proxy, it shall file with the Com-

mission, not later than 80 calendar days prior to the date the definitive copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6 (§ 240.14a-6 of this chapter), or such shorter period prior to such date as the Commission or its staff may permit, six copies of the following items:

(1) The proposal;

(2) Any statement in support thereof as received from the proponent;

(3) A statement of the reasons why the registrant deems such omission to be proper in the particular case; and

(4) Where such reasons are based on matters of law, a supporting opinion of counsel. The registrant shall at the same time, if it has not already done so, notify the proponent of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of reasons why the registrant deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

(e) If the registrant intends to include in the proxy statement a statement in opposition to a proposal received from a proponent, it shall, not later than 30 calendar days prior to the date the definitive copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6, or, in the event that the proposal must be revised to be includable, not later than five calendar days after receipt by the registrant of the revised proposal, promptly forward to the proponent a copy of the statement in opposition to the proposal. In the event the proponent believes that the statement in opposition contains materially false or misleading statements within the meaning of Rule 14a-9 and the proponent wishes to bring this matter to the attention of the Commission, the proponent promptly should provide the staff with a letter setting forth the reasons for this view and a copy of the statement in op-

position and at the same time promptly provide the registrant with a copy of his letter.

17 C.F.R. § 240.14a-9(a)

(SEC Rule 14a-9(a), the Rule Against Misleading Proxy Materials)

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.